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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BULK OIL (ZUG) A.G.,
Petitioner,

v.

SUN COMPANY, INC.,
SUN OIL TRADING COMPANY,
SUN INTERNATIONAL, INC., AND
SUN INTERNATIONAL LIMITED,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED *

1. Whether section 1 of the Sherman Act applies to a concerted restraint of trade that occurs only partly within the United States, but is directed from within the United States by United States citizens and affects the import commerce of the United States.

2.a. Whether random and internally inconsistent statements of government ministers in parliamentary debate rise to the level of an act of state.

b. Whether the courts of the United States may adjudicate a claim involving an act of state where such adjudication would pose no likelihood of straining or injuring our foreign relations.

3. Whether the statute that prohibits invidious discrimination in furtherance of the Arab boycott of Israel is the only federal civil rights law benefiting an identified class under which a victim has no private right of action.

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* Petitioner, Bulk Oil (Zug) A.G., is a wholly-owned subsidiary of Bulk Oil Holding A.G. and is an affiliate of Bulk Oil (USA) Inc., Bulk Oil (Milano) S.r.l., Bulk Oil (UK) Ltd., Bulk Oil (Switzerland) A.G., Bulk Oil (Germany) G.m.b.h., Bulk Oil (Belgium) S.A., Bulk Oil (Rotterdam) B.V., Bulk Oil International Ltd., Bulk Oil Trading A.G., Bulk Oil Services A.G., Bulk Oil Shipping S.A., Bulk Oil International Chartering Ltd., Jasmine Chartering Ltd. and Bulk Oil Shipping Services (UK) Ltd.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Bulk Oil (Zug) A.G. ("Bulk Zug") hereby prays that this Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit affirming the dismissal of the complaint in this case.

OPINIONS BELOW

The opinions of the court of appeals and the district court, which have not been published, are reproduced in Appendix A, *infra*.[1]

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[1] A separate opinion of the district court, dated August 25, 1983, dismissed Bulk Zug's claim of tortious interference with contract. Bulk Zug does not seek review of the dismissal of that claim and

JURISDICTION

The judgment of the court of appeals was entered on February 17, 1984. A timely petition for rehearing was denied by an order filed April 3, 1984. App. A at 25a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATION INVOLVED

This case involves section 1 of the Sherman Act, 15 U.S.C. § 1, sections 8 and 11 of the Export Administration Act of 1979, 50 U.S.C. App. §§ 2407, 2410, and 15 C.F.R. § 369.2. These are reproduced in Appendix B, *infra*.

STATEMENT OF THE CASE[2]

This dispute centers upon the concerted refusal of respondents Sun International Limited ("SIL") and Sun Oil Trading Company ("SOTC"), together with other parties, acting in compliance with the Arab boycott of Israel, to deliver North Sea crude oil destined for Israeli ports to Bulk Zug.

On April 13, 1981, SIL entered into a contract to supply such oil to Bulk Zug. The contract had been negotiated principally by telex between Bulk Zug in Europe and SIL and SOTC at their offices in Wayne, Pennsylvania,[3] where all of the respondents' decisions relating to final

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the August 25 opinion accordingly is not reproduced in the appendix. Bulk Zug also does not seek review of the dismissal of its claim under the Racketeer Influenced and Corrupt Organizations Act. See App. A at 18a-23a.

[2] The judgment appealed from affirmed the district court's dismissal of the complaint. Accordingly, the well-pleaded allegations of the complaint must, at this juncture, be taken as true. Miree v. DeKalb County, 433 U.S. 25, 27 n.2 (1977).

[3] These also are the offices of respondents Sun Oil Company ("Sunoco"), the parent of SIL and SOTC, and Sun International, Inc. ("SII"), a sister of SIL and SOTC.

contract terms were made. A broker in New York City also was involved in these negotiations. The oil in question was obtained by SIL from Svenska Petroleum A.B. ("Svenska"), who in turn obtained its oil from British Petroleum, P.L.C. ("BP"). Although the broker and Svenska were co-conspirators with the respondents in the group boycott of Bulk Zug, Complaint ¶¶ 49, 65, Svenska, BP and the broker are not parties to this action.[4]

At the time the contract was entered into, SIL and SOTC knew that the crude oil to be delivered to Bulk Zug was destined for Israel. Complaint ¶ 56. The contract contained a destination clause that provided: "Destination Free but always in line with exporting country's Government policy. United Kingdom Government policy, at present, does not allow delivery to South Africa."

The United Kingdom did not preclude by law or regulation the exportation of crude oil to Israel. Several random and internally inconsistent parliamentary statements by various government officials suggested that the government hoped companies exporting North Sea crude oil would accord trading preferences to members of the European Economic Community, the International Energy Agency and their traditional trading partners. Such parliamentary statements, however, do not have the force of law and would not have been enforced by British customs authorities. See page 11, *infra*. As a matter of official policy the United Kingdom does not support the Arab boycott of Israel.

In May 1981, Bulk Zug nominated Israel as the destination of the first oil to be supplied under the contract. When Bulk Zug's nomination of Israel became known in the oil trading community, BP, Svenska and the four re-

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[4] The presence of these co-conspirators leaves Bulk Zug's claim under the Sherman Act unaffected by the decision in Copperweld Corp. v. Independence Tube Corp., 52 U.S.L.W. 4821 (U.S. June 19, 1984).

spondents, concerned about possible adverse reactions from Arab oil-producing nations, decided to comply with the Arab boycott and to refuse to deliver the oil to Bulk Zug. This decision and its implementation caused a $15 million injury to Bulk Zug and form the basis for Bulk Zug's claim that the respondents and their co-conspirators have violated the Sherman Act and the Export Administration Act.

SIL (and SOTC as SIL's assignee), claiming that Bulk Zug had named an improper destination and had breached the contract thereby, took the matter to arbitration in London. The arbitrator's findings included the following: (1) most Arab countries will not supply Israel with oil; (2) the blacklist of the Arab boycott extends to companies that sell oil to Israel, so that firms such as the respondents and their co-conspirators are forced to choose between trading with Israel and trading with the Arab nations; and (3) in late 1980 and early 1981, there was an attempt by Israel to secure a term agreement for the supply of a substantial quantity of crude oil over a period of 12 to 18 months from the United Kingdom oil fields in the North Sea. This attempt was undertaken by Bulk Zug and led to this lawsuit.

The arbitrator, who of course had no cognizance of either the Sherman Act or the Export Administration Act, found that United Kingdom "policy" forbade the export of North Sea crude oil to Israel. On May 5, 1983, he awarded SIL and SOTC $12,673,259.38, plus interest (a total of approximately $15 million).[5] In the meantime, Bulk Zug had instituted this action in the U.S. District Court for the Southern District of New York on January 25, 1983.

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[5] Bulk Zug has appealed from the final decision of the arbitrator. Leave to appeal to the Court of Justice of the European Communities has been allowed by the British courts and the appeal to the Court of Justice is pending.

The objective of the Arab boycott of Israel is to restrain trade by companies trading directly or indirectly with Israel. Participation in these boycotting activities by the respondents—three of which (Sunoco, SOTC and SII) are United States citizens—falls within the proscription of the Sherman Act.

The respondents' activities were within the import commerce of the United States. Sunoco, through its "Trading Group" (SOTC, SIL and SII), purchases, sells, exchanges, and trades crude oil in all areas of the world, including the United States. The Trading Group is responsible for ensuring that the crude oil requirements of Sunoco's domestic refineries are met by a steady stream of supply. As a direct result of the oil trading activities of this Group, a substantial amount of foreign source crude oil regularly is imported into the United States. Indeed, more than half of the oil that was supposed to have been delivered to Bulk Zug ultimately was delivered to the United States.

The respondents' participation in the boycott affects such United States commerce. In order to maintain the stream of crude oil required for Sunoco's domestic refineries, the respondents must preserve favorable trading relationships with the Arab nations. Compliance with the Arab boycott of Israel is essential to ensure such relationships.

Such compliance, however, also affects United States commerce. This effect is felt in two ways. First, as is evident from the facts of this case, compliance forecloses open trade with certain trading members of the worldwide oil market. Elimination of trade with these trading partners means that the respondents have fewer potential suppliers with whom they may deal. This restriction of choices jeopardizes the flow of crude oil into the United States. To the extent more companies like Bulk Zug trade with Israel and fail to comply with the Arab boy-

cott, the respondents' alternatives would be narrowed further, thereby heightening the threat to the stream of crude oil flowing into the United States.

Second, compliance denies to the respondents and their co-conspirators the freedom to decide independently with whom they will deal. Such a restraint, particularly on a United States firm (a category that includes three of the respondents and the co-conspiring oil broker), has long been recognized by this Court as one of the classic adverse effects of a group boycott. *See, e.g., Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213 (1959).

JURISDICTION OF THE DISTRICT COURT

The jurisdiction of the district court in this case was based upon 28 U.S.C. §§ 1331 and 1337, and upon sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26.

REASONS FOR GRANTING THE WRIT

There are three reasons for granting a writ of certiorari in this case:

1. The position taken by the court of appeals[6] and the district court is in conflict with the decision of the Court of Appeals for the Ninth Circuit in *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976). Also, whether the United States antitrust laws apply to conduct that occurs partly within the United States, is directed from within the United States by United States citizens and affects United States commerce is an important question that should be addressed

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[6] The court of appeals affirmed the judgment of the district court "substantially for the reasons set forth in [District] Judge Stewart's" opinion. App. A at 2a. Judge Stewart, relying upon the decision of the Second Circuit in National Bank of Canada v. Interbank Card Ass'n, 666 F.2d 6 (2d Cir. 1981), expressly had declined to follow the standard established by the Ninth Circuit in Timberlane Lumber Co. v. Bank of America, N.T. & S.A., 549 F.2d 597 (9th Cir. 1976). App. A at 5a-7a.

by this Court even in the absence of an intercircuit conflict.

2. The decisions of the courts below as to what constitutes an "act of state" and as to whether a federal court may exercise jurisdiction in a case where an act of state is found constitute an unwarranted expansion of the act of state doctrine and fail to follow such decisions of this Court as *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), and *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976).

3. The rulings below make the Export Administration Act the only federal civil rights law protecting a specified class of persons under which a victim has no redress against the perpetrator.

I. The Decisions Below Conflict With A Decision Of The Court Of Appeals For The Ninth Circuit On A Substantial Issue Of Antitrust Jurisdiction

The complaint alleges that conduct of the respondents and others, although occurring only partly within the United States, was directed from within the United States by United States citizens, affected United States import commerce and injured Bulk Zug.

The district court stated that it lacked jurisdiction to hear Bulk Zug's Sherman Act claim because the complaint alleged an effect upon United States commerce but did not allege an anticompetitive effect on United States commerce. App. A at 5a-7a. The district court reached this conclusion by applying the decision of the Second Circuit in *National Bank of Canada v. Interbank Card Association*, 666 F.2d 6 (2d Cir. 1981):

> In *Interbank*, the Second Circuit stated that the proper test of jurisdiction in cases alleging extraterritorial violations of the antitrust laws was "whether the challenged restraint has, or is intended to have,

> any anticompetitive effect upon United States commerce, either commerce within the United States or export commerce from the United States." [citation omitted] In stating this test, the Second Circuit specifically rejected the Ninth Circuit's test for jurisdiction in such cases as stated in *Timberlane*. . . .

App. A at 5a (footnote omitted).

The Ninth Circuit's test, as stated in *Timberlane*, requires "that there be *some* effect—actual or intended—on American foreign commerce" before subject matter jurisdiction under the antitrust laws may be exercised. *Timberlane*, 549 F.2d at 613 (emphasis in original). In addition, the effect must present a cognizable injury to the plaintiff and the interests of the United States must be strong enough to justify assertion of jurisdiction. *Id.*

The district court in this case took the position that while the complaint alleged effects on United States commerce, the fact that those effects were positive meant that there was no subject matter jurisdiction "under *Intercard*'s [sic] standard." App. A at 6a.[7] Thus, conflicting results are reached by applying the tests of *Timberlane* and *Interbank* to the facts of this case. The complaint satisfies the former but not the latter.

Even were there no conflict between the Second and Ninth Circuits here, the application of the antitrust laws to conduct occurring wholly or partly outside the United States but having an effect upon United States commerce has become increasingly controversial in recent years.

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[7] This ruling by the district court ignored the fact that even practices that temporarily stimulate competition may be forbidden by the antitrust laws. *See, e.g.*, Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212-14 (1959); Kiefer-Stewart Co. v. Seagram & Sons, 340 U.S. 211, 213 (1951); Fashion Originators' Guild v. Federal Trade Commission, 312 U.S. 457, 465-66 (1941); United States v. Patten, 226 U.S. 525, 542 (1913).

See, e.g., In re Uranium Antitrust Litigation, 617 F.2d 1248 (7th Cir. 1980); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979); *Timberlane*, 549 F.2d 597; Kintner & Griffin, *Jurisdiction Over Foreign Commerce Under the Sherman Antitrust Act*, 18 B.C. Indus. & Com. L. Rev. 199 (1977); Ongman, *"Be No Longer A Chaos": Constructing a Normative Theory of the Sherman Act's Extraterritorial Jurisdictional Scope*, 71 Nw. U.L. Rev. 733 (1977). The issue should be clarified by this Court.

Controversial or not, though, the application of the Sherman Act to circumstances like those in this case has been well settled for four decades. *See United States v. Aluminum Company of America*, 148 F.2d 416 (2d Cir. 1945). Moreover, Congress has amended the antitrust laws on several occasions during this period and has taken no action to alter this standard.[8] The Second Circuit's attempt here and in *Interbank* to contract Sherman Act jurisdiction is an unwarranted interference with the legislative role of the Congress.

The respondents' decision to comply with and participate in the Arab boycott of Israel—the concerted refusal to deal alleged by Bulk Zug—was formulated within and implemented from the United States by United States citizens. The effect of the decision was to prohibit American companies, as well as respondent SIL, from engaging in business abroad essential to the maintenance of a stream of crude oil into the United States. Such a restraint on United States companies affects our national interest and, regardless of the origin or destination of the oil involved, the scope of the Sherman Act extends to

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[8] Congress' latest word on the subject, the Foreign Trade Antitrust Improvements Act of 1982, Pub. L. No. 97-290, title IV, 96 Stat. 1246, codified certain judicial interpretations restricting the application of the Sherman Act to export commerce. This clarification expressly is inapplicable to "import trade or import commerce." *Id.*, § 402 (adding a new section 7 to the Sherman Act, 15 U.S.C. § 6a).

such activities. *See Pacific Seafarers, Inc. v. Pacific Far East Line, Inc.*, 404 F.2d 804 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1093 (1969).

Thus, the decisions below dismissing Bulk Zug's claim under the Sherman Act merit review by this Court, both because they conflict with *Timberlane* and because they would overturn a construction of the Sherman Act long followed by the courts and acquiesced in by the Congress.

II. The Decisions Below Applying The Act Of State Doctrine Fail To Follow The Decisions Of This Court And Conflict With Act Of State Principles Followed By Other Courts Of Appeals

The district court, finding that certain statements made during debate in the British House of Commons constituted acts of state of the United Kingdom, held that under the act of state doctrine, further inquiry was "inappropriate." App. A at 7a. The district court, and the court of appeals in approving the district court's ruling, thus made two glaring misinterpretations of the act of state doctrine.

For one thing, no act of state is present in this case. The Prime Minister stated that "[i]t is not our policy to control either the pricing *or disposal* of our North Sea oil, although the Government expect companies exporting North Sea crude to *give priority* to countries belonging to IEA and the EEC." Arbitrator's Interim Award ¶ 46 (emphasis added). Several lesser ministers, on the other hand, stated at various times that the government hoped that oil exporters would limit their exports to members of the European Community and the International Energy Agency, as well as to destinations with which they had historic trading patterns. Even if these statements could be construed as stating a clear or consistent policy, they do not rise to the level of an act of state.

This is further demonstrated by the fact that, during the arbitration hearing in London, a Senior Customs Officer of Her Majesty's Customs and Excise testified that there was no law restricting the destination of North Sea crude oil shipments and that Customs would have taken no action whatever regarding the shipments here at issue. There was thus not only a lack of consistency in the ministers' statements but also a lack of coercive force behind them.

This Court has required some formal or direct specific action to invoke the doctrine. *See, e.g., Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 695 (1976) (absence of "statute, decree, order or resolution" of foreign sovereign); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 378 (1964) (expropriation); *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909) (expropriation). Leading lower court cases in this area also have involved concrete and substantial acts taken on behalf of the foreign sovereign. *See, e.g., International Association of Machinists v. OPEC*, 649 F.2d 1354 (9th Cir. 1981) (price setting), *cert. denied*, 454 U.S. 1163 (1982); *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir.) (expropriation), *cert. denied*, 434 U.S. 984 (1977); *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92 (C.D. Cal. 1971) (license issuance), *aff'd*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972); *see also* Annot., 12 A.L.R. Fed. 707, 748-49 (1972 & Supp. 1983).

More significant than its erroneous characterization of the parliamentary statements as an act of state was the district court's conclusion that the presence of an act of state automatically bars consideration of the case by American courts. App. A at 7a-9a. This Court, however, has rejected the idea of an "inflexible and all-encompassing rule" in act of state cases. *Sabbatino*, 376 U.S. at

428; *see also Timberlane*, 549 F.2d at 605-06. The question is not whether there is an act of state, but whether adjudication of the claim by our courts threatens to "embarrass the Executive Branch of our Government in the conduct of our foreign relations." *Alfred Dunhill*, 425 U.S. at 697; *see also Sabbatino*, 376 U.S. at 428 ("[T]he less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches.").

The district court, without considering the foreign policy implications of adjudicating plaintiff's claim, concluded that since there was a United Kingdom "policy" involved, the act of state doctrine barred further judicial inquiry. App. A at 7a-9a. Given the facts of this case and the doctrine's purpose, there is no justification for its invocation here.

The United Kingdom does not support the Arab boycott of Israel. Complaint ¶¶ 31-32; 49 Fed. Reg. 13,945 (1984). Three of the respondents are United States citizens; the fourth is controlled by one of the other three. The respondents and their activities are well within the reach of our antitrust laws. Under such circumstances, there is no likelihood of straining foreign relations with the United Kingdom by adjudicating this antitrust claim. *See Timberlane*, 549 F.2d at 614.

In the face of contrary teachings of this Court, the district court found an act of state where there was none and then took the position that our courts ipso facto may not adjudicate a case in which an act of state is involved.[9]

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[9] To the extent the district court relied on the sovereign compulsion defense enunciated in Interamerican Refining Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. 1291 (D. Del. 1970), App. A at 8a, such reliance improperly stretched that doctrine as well. "The defense of foreign government compulsion is in general available only when the [foreign] state's requirements are embodied in binding laws or regulations subject to penal or other severe sanction; it is not available when the [foreign] state's orders are given

The court of appeals acquiesced in these errors. Unless corrected by this Court, the misapprehensions of the courts below could be viewed as a substantial expansion of the act of state doctrine.

III. The Decisions Below Make The Antiboycott Provisions Of The Export Administration Act The Only Federal Civil Rights Statute Protecting A Specified Class Of Persons Under Which A Victim Has No Private Right Of Action

The district court dismissed Bulk Zug's claim under the antiboycott provisions of the Export Administration Act of 1979, 50 U.S.C. App. §§ 2401-2420 (Supp. V 1981) ("EAA"), on the ground that there is no private right of action for parties injured by violations of those provisions. The only other federal court that has considered this issue found that such a right does exist. *Abrams v. Baylor College of Medicine*, 581 F. Supp. 1570 (S.D. Tex. 1984); see discussion at page 21, *infra*.

The antiboycott provisions of the EAA were enacted in 1977, following a long and bitter struggle within and without the Congress. *See, e.g.*, H.R. Rep. No. 190, 95th Cong., 1st Sess. 4-6 (1977). This statute represents the principal response of the United States to what had been, prior to 1977, the increasingly great impact upon American businesses of Arab pressure to participate in the boycott of Israel. *Id.* at 47-55 (additional views of Rep. Rosenthal).

So far as is here relevant, the regulations implementing the antiboycott provisions of the EAA prohibit any

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in the form of 'guidance,' informal communications, or the like." Restatement (Revised) of Foreign Relations Law § 419 comment c (Tent. Draft No. 3, 1982). The active policing required by *Interamerican* and the revised Restatement is absent in the instant controversy and the sovereign compulsion defense therefore is inapplicable. The United Kingdom did not compel respondents' violation of the antitrust laws. *See* Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1293 (3d Cir. 1979).

"United States person," with respect to his activities in the interstate or foreign commerce of the United States, from refusing to do business with any other person when such refusal is pursuant to a requirement of a boycotting country. 15 C.F.R. § 369.2(a)(1) (1984); *see also* 50 U.S.C. App. § 2407(a)(1) (Supp. V 1981).[10]

The antiboycott provisions are a civil rights law. The prohibition upon refusing to do business for boycott reasons is similar to the prohibition on refusing to do business for racial reasons contained in the Civil Rights Act of 1870. *Compare* 50 U.S.C. App. § 2407(a)(1)(A) (Supp. V 1981) *with* 42 U.S.C. § 1981 (1976). The antiboycott provision forbidding racial, religious and similar forms of discrimination (which is not directly at issue here) is similar to both section 1981 and to title VII of the Civil Rights Act of 1964. *Compare* 50 U.S.C. App. § 2407(a)(1)(B) (Supp. V 1981) *with* 42 U.S.C. § 1981 (1976) *and* 42 U.S.C. §§ 2000e through 2000e-17 (1976 & Supp. V 1981).

The history of the antiboycott provisions confirms their civil rights purpose. The Senate report speaks of "fundamental U.S. social and legal principles" and "actions which are repugnant to American values and traditions," S. Rep. No. 104, 95th Cong., 1st Sess. 21-22 (1977), and President-elect Carter, who seven months later signed the antiboycott provisions into law, spoke in December 1976 of " 'the right of Americans to engage in international commerce without being subjected to discrimination on grounds of their race, their religion or the countries with which they trade.' " H.R. Rep. No. 190, 95th Cong., 1st Sess. 47 (1977) (additional views of Rep. Rosenthal).

Since *Cort v. Ash*, 422 U.S. 66 (1975), this Court has addressed directly on three occasions whether private

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[10] The existence of each of these elements as to the respondents is well pleaded in the complaint. Complaint ¶¶ 17-19, 24-29, 34, 41-54, 56, 62, 64-65, 67, 69.

rights of action exist under civil rights statutes. *Cannon v. University of Chicago*, 441 U.S. 677 (1979), recognized a private right of action under title IX of the Education Amendments of 1972, which prohibits sex discrimination by educational institutions receiving federal funds. *Guardians Association v. Civil Service Commission of New York*, 103 S. Ct. 3221 (1983), recognized such a right under title VI of the Civil Rights Act of 1964, which prohibits discrimination in federally-assisted activities on grounds of race, color or national origin. Finally, the petitioner in *Consolidated Rail Corp. v. Darrone*, 104 S. Ct. 1248 (1984), conceded that such a right existed under section 504 of the Rehabilitation Act of 1973, which bars discrimination by federal grantees against the handicapped. *Id.* at 1252 n.7.

Before *Cort v. Ash* was decided, the rule as to implied private rights of action was that stated in *Texas & Pacific Railway Co. v. Rigsby*, 241 U.S. 33 (1916): "A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied. . . ." *Id.* at 39. *Cort* and its progeny changed the focus of the inquiry for statutes in general to whether Congress had intended to imply a private right of action, *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353 (1982), and made the *Rigsby* criterion the first of four to be used to ascertain that intent.[11] *Texas Industries, Inc.*

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[11] The *Cort* criteria are:

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted,"—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inap-

v. Radcliff Materials, 451 U.S. 630, 639 (1981); *Davis v. Passman*, 442 U.S. 228, 241 (1979).

Although ostensibly decided by applying the *Cort v. Ash* criteria, the *Cannon-Guardians Association-Darrone* line of cases also may be viewed as stating a "civil rights" (or *Rigsby*-based) exception to *Cort*: A private right of action will be implied under a civil rights law if that law benefits an identified class, even if the legislative history is ambiguous.[12] In *Cannon*, for example, one of the principal sponsors of the relevant legislation had expressed during Senate debate his dismay at the decision to *omit* a private right of action. *Cannon*, 441 U.S. at 724 n.13 (White, J., dissenting). Two of the plurality opinions in *Guardians Association* cited legislative history strongly suggesting that no private right of action should be implied under title VI. *Guardians Association*, 103 S. Ct. at 3231-32 (opinion of White, J.), 3236 (opinion of Powell, J.). Justice White noted that a proposal for an express private right of action made by several leading Senate sponsors of the legislation was not included in the final version and Justice Powell observed that Congress had included express rights of action in several other

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propriate to infer a cause of action based solely on federal law?

Cort, 422 U.S. at 78 (citations omitted).

[12] The antiboycott provisions state that they do not supersede or limit the operation of the "civil rights laws," 50 U.S.C. App. § 2407(a)(4) (Supp. V 1981), but this does not mean that they are not themselves such a law. In Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981), a clause preserving rights of action under "any statute" was held to refer only to rights under any statute *other than* the one under consideration because it would have made no sense to refer to the very statute in which the clause was contained. *Id.* at 13-16. Here too, it would have made no sense to provide that "this law does not limit the operation of this law." In addition, the civil rights content of the antiboycott provisions speaks far louder on this point than any interpretation of a clause as ambiguous as subsection (a)(4).

titles of the same act. This Court nevertheless recognized such a right in each case.

Even if this line of cases is not viewed as creating a per se private right of action under civil rights statutes, *Cort* and its progeny draw an important line between statutes that benefit an identified class and those that do not. The statutes that have been considered in private right of action cases fall into two categories: first, those that impose a duty upon certain persons but do not create a corresponding right in others, and second, those that both impose a duty upon some *and* expressly create corresponding rights for others. The antiboycott provisions of the EAA are of the latter type because they prohibit certain persons from discriminating against specified other persons.

"[T]he right- or duty-creating language of the statute has generally been the most accurate indicator of the propriety of implication of a cause of action." *Cannon*, 441 U.S. at 690 n.13 (1979). This Court observed in *Cannon* that with one exception,[13] it always had recognized a private right of action "where the language of the statute explicitly conferred a right directly on a class of persons that included the plaintiff in the case." [14] *Id.*; *see Guardians Association*, 103 S. Ct. 3221 (1983); *see also Cannon*, 441 U.S. at 698 n.22. The EAA, which prohibits refusal by a United States person to do business

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[13] The lone exception involved a statute that "reflected a special policy against judicial interference" with self-government by Indian tribes. *Cannon*, 441 U.S. at 690 n.13 (citing Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978)).

[14] That there are multiple classes protected under the legislation, McDaniel v. University of Chicago, 548 F.2d 689, 693 (7th Cir. 1977), *cert. denied*, 434 U.S. 1033 (1978), or that the membership of the protected class(es) may be numerous is no bar to a finding that a private right of action exists. Stavisky v. Metropolitan Transportation Authority, 533 F. Supp. 1146 (E.D.N.Y. 1982); *see Guardians Association*, 103 S. Ct. 3221 (statute providing that "[n]o person" shall be discriminated against); *Cannon*, 441 U.S. 677 (same).

"with . . . *any* . . . person" if the refusal is due to the boycott, is such a statute and Bulk Zug is one of those that it seeks to protect. 50 U.S.C. App. § 2407(a)(1)(A) (Supp. V 1981) (emphasis supplied).[15]

The subsequent decisions of this Court have followed consistently *Cannon*'s focus on the existence of an expressly benefited class. Thus, statutes providing that "[n]o person . . . shall . . . be excluded" from participation in federally-assisted programs for discriminatory reasons were held to have been enacted to benefit particular classes—and to provide private rights of action—in *Cannon* and *Guardians Association*. *See also, e.g., Darrone*, 104 S. Ct. at 1252 n.7 (1984) (private right of action conceded under statute providing that "[n]o otherwise qualified handicapped individual . . . shall . . . be excluded" from federally assisted programs); *Allen v. State Board of Elections*, 393 U.S. 544 (1969) (pre-*Cort* decision finding private right of action under statute providing that "[n]o person shall be denied the right to vote").

By comparison, a statute merely prohibiting "[t]he creation of any obstruction . . . to the navigable capacity of any of the waters of the United States" was found not to benefit an identifiable class, and not to contain an implied private right of action, in *California v. Sierra Club*, 451 U.S. 287 (1981). *See also, e.g., Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979) (no private right of action under statute requiring brokers to file financial reports with SEC); *Cort v. Ash*,

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[15] The EAA's prohibition of a United States person's refusal, for boycott reasons, to do business with "any" person contains no qualification regarding the citizenship of the victim. 50 U.S.C. App. § 2407(a)(1)(A) (Supp. V 1981); *see also* H.R. Rep. No. 190, 95th Cong., 1st Sess. 51 (1977) (additional views of Rep. Rosenthal) (statute directed at discrimination against European as well as American firms); *cf.* 50 U.S.C. App. § 2407(a)(1)(B) (Supp. V 1981) (prohibition of discrimination against United States persons only).

422 U.S. 66 (no private right of action under statute making criminal any contribution by corporation or national bank to candidate for federal office); *National Railroad Passenger Corp. v. National Association of Railroad Passengers*, 414 U.S. 453 (1974) (no private right of action for passengers under statute authorizing railroad operator to discontinue service under specified circumstances).[16]

As the Court stated in *Cannon*, "[t]here would be far less reason to infer a private remedy in favor of individual persons if Congress, instead of drafting [the statute] with an unmistakable focus on the benefited class, had written it simply as a ban on discriminatory conduct. . . ." 441 U.S. at 690-93. Because the antiboycott provisions of the EAA specify whom they protect, they are like the statutes considered in *Cannon*, *Guardians Association*, *Darrone* and *Allen* rather than those reviewed in *Sierra Club*, *Touche Ross & Co.*, *Cort* and *National Railroad Passenger Corp.*

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[16] The decisions in Transamerica Mortgage Investors, Inc. v. Lewis, 444 U.S. 11 (1979), and Daily Income Fund, Inc. v. Fox, 104 S. Ct. 831 (1984), are not inconsistent with this dichotomy.

In *Transamerica*, an express private right of action had appeared in the predecessor legislation, the companion legislation and the original legislation that had become the statute before the Court. Here, by contrast, there was no express private right of action in either the predecessor of the EAA or in the bills that became the antiboycott provisions in 1977. H.R. 5840, 95th Cong., 1st Sess. (1977); S. 69, 95th Cong., 1st Sess. (1977). That is, the weight of the adverse legislative history here, *see* note 20, *infra*, is minimal and is like that rejected in *Cannon*, 441 U.S. 724 n.13, and Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353, 407 & n.16 (Powell, J., dissenting), rather than that found in *Transamerica* to bar a private right of action.

In *Fox*, the Court held that where the statute expressly provided a right of action for *one* specified class of private parties, such a right would not be implied for *another* such class. In the case at bar, however, the EAA provides no express right of action for any private party.

Two other factors under *Cort v. Ash*, consistency with the underlying purposes of the legislative scheme [17] and the federal nature of the cause of action [18] strongly favor recognition of a private right of action under the anti-boycott provisions.

The history of the statute—the remaining *Cort* factor—is mixed and sparse here.[19] Section 11(g)(1), 50 U.S.C. § 2410(g)(1) (Supp. V 1981), provides that "[n]othing in subsection (c), (d), or (f) [of section 11] limits . . . the availability of other administrative or judicial remedies with respect to violations of this Act, or any regulation, order, or license issued under this Act. . . ." *Id.* In *Merrill Lynch, Fenner & Smith v. Curran*, the presence of a provision similar to subsection (g)(1) was held to be strong evidence of congressional intent to al-

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[17] Neither the statute nor the implementing regulations afford the victim any role in administrative proceedings, 15 C.F.R. pt. 388 (1984); *see Cannon*, 441 U.S. at 706 n.41; CETA Workers' Organizing Committee v. City of New York, 617 F.2d 926, 934 n.6 (2d Cir. 1980), and there is no provision under the administrative scheme for recovery by the victim of his damages (which in this case are 15 million dollars). *See CETA Workers' Organizing Committee*, 617 F.2d at 933 n.5.

[18] Federal law not only creates the right in question but expressly preempts all state and local laws on the subject. 50 U.S.C. App. § 2407(a)(1), (c) (Supp. V 1981); *see* Hofbauer v. Northwestern National Bank, 547 F. Supp. 940, 949 (D. Minn. 1981), *rev'd on other grounds*, 700 F.2d 1197 (8th Cir. 1983). A victim of a refusal to do busines that violates the EAA thus can have no redress under state law. *Cf.* Jackson Transit Authority v. Local Division 1285, Amalgamated Transit Union, 457 U.S. 15 (1982) (availability of state remedy a factor militating against recognition of implied federal right of action).

[19] Such sparseness, which is common in cases where a private remedy is not provided expressly in a statute, is no bar to a finding that a private remedy exists. *Cannon*, 441 U.S. at 694; Bratton v. Shiffrin, 635 F.2d 1228 (7th Cir. 1980), *cert. denied*, 449 U.S. 1123 (1981).

low a private right of action even though another provision of the act there in question gave the Commodity Futures Trading Commission "exclusive jurisdiction" over the trading of commodity futures. 456 U.S. at 386-87.[20]

The only other court that has addressed this question found in favor of a private right of action under this statute. *Abrams v. Baylor College of Medicine*, 581 F. Supp. 1570, 1580-81 (S.D. Tex. 1984). The court in *Abrams* concluded that the antiboycott provisions protect an " 'especial class,' " that a private right of action "is consistent with the underlying purposes of the legislative scheme," that the matter is one involving federal rather than state law and that "the legislative history, viewed as a totality, militates in favor of implying a private cause of action." *Id.*[21]

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[20] The report on the Senate version of the legislation that became the antiboycott provisions of the EAA contained a brief statement suggesting that no private right of action would exist under the statute. S. Rep. No. 104, 95th Cong., 1st Sess. 22 (1977). This is the only negative suggestion in the history of the 1977 enactment, and it does not overcome the strong presumption in favor of a private right of action that arises from the presence of an identified benefited class.

In *Cannon*, for example, a private right of action was found even though Senator Keating, an author of the relevant bill, had decried during the Senate floor debate the decision to *omit* such a right. 441 U.S. at 724 n.13. In *Merrill Lynch*, 456 U.S. at 407 & n.16 (1982) (Powell, J., dissenting), a private right of action was recognized despite a chart published by the Senate committee indicating a belief that such a right did not exist under current law (which ultimately was not altered by the Congress). Finally, in Leist v. Simplot, 638 F.2d 283, 345 & n.15 (2d Cir. 1980) (dissent), *aff'd sub nom.* Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353 (1982), a private right of action was found in the face not only of the chart cited above, but also a strong, visible and unsuccessful effort at the committee stage to include an express private right of action in the legislation.

[21] Judgment has not yet been entered in the *Abrams* action. Should judgment be entered and appealed to the Court of Appeals

The decisions below constitute a marked departure from the general rule that where a statute creates civil rights for an identified class, a private right of action for members of that class will be recognized in the federal courts. This Court should examine the propriety of such a departure.

CONCLUSION

This case merits review by the Supreme Court. It presents a conflict between two circuits on an important question of antitrust jurisdiction, it involves a substantial expansion of the act of state doctrine by the courts below and it creates a glaring exception to the general principle that the victim of discrimination prohibited by a federal civil rights statute has a cause of action against the perpetrator. For these reasons, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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Attorneys for Petitioner

July 2, 1984

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for the Fifth Circuit while this case is pending, Bulk Zug will so inform the Court.

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the — day of ————, One Thousand Nine Hundred and Eighty-four.

PRESENT:

HON. J. EDWARD LUMBARD, *Circuit Judge*
HON. ELLSWORTH A. VAN GRAAFEILAND, *Circuit Judge*
HON. EDWARD D. RE, *Chief Judge*,
*U.S. Court of International Trade**

Nos. 83-7779, 83-7781, 83-7785

BULK OIL (ZUG) A.G.,
Plaintiff-Appellant,

v.

SUN COMPANY, INC., *et al.*,
Defendants-Appellees.

BULK OIL (MILANO) S.R.L.,
Plaintiff-Appellant,

v.

SUN INTERNATIONAL LIMITED and
SUN OIL TRADING COMPANY,
Defendants-Appellees.

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* Sitting by designation.

ORDER

[Filed Feb. 17, 1984]

Bulk Oil (Zug) A.G. appeals from a Memorandum Decision and Order of Judge Charles E. Stewart of the United States District Court for the Southern District of New York, dated August 11, 1983, which dismissed the first, second and fourth claims in plaintiff's complaint and from Judge Stewart's Memorandum Decision and Order, dated August 25, 1983, which dismissed plaintiff's third claim. Bulk Oil (Milano) S.R.L. appeals from Judge Stewart's Memorandum Decision and Order, dated August 11, 1983, which dismissed its complaint.

Now, after due consideration, we affirm the judgments entered in the office of the Clerk of the United States District Court for the Southern District of New York on the 2nd day of September, 1983, substantially for the reasons set forth in Judge Stewart's three Memorandum Decisions and Orders.

/s/ J. Edward Lumbard
HON. J. EDWARD LUMBARD

/s/ Ellsworth A. Van Graafeiland
HON. ELLSWORTH A. VAN GRAAFEILAND

/s/ Edward D. Re
HON. EDWARD D. RE

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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83 Civ. 741 (CES)

BULK OIL (ZUG) A.G., a Swiss Corporation,
Plaintiff,

—against—

SUN COMPANY, INC., a Pennsylvania Corporation, SUN OIL TRADING COMPANY, a Delaware Corporation, SUN INTERNATIONAL, INC., a Delaware Corporation, and SUN INTERNATIONAL LIMITED, a Bermuda Corporation,
Defendants.

MEMORANDUM DECISION

STEWART, District Judge:

This case concerns a contract between plaintiff Bulk Oil (Zug) A.G. ("Bulk (Zug)") and defendant Sun International Ltd. ("SIL") for a supply of North Sea crude oil. Also named as defendants are Sun Company, Inc. ("Sunoco"), Sun Oil Trading Company ("SOTC") and Sun International, Inc. ("SII"). Occasionally we may refer to the defendants collectively as "Sun".

Plaintiff claims that SIL's refusal to deliver the oil contracted for violated section 1 of the Sherman Act, the Export Administration Act, and the Racketeering Influenced and Corrupt Organizations Act. In addition, plaintiff seeks recovery for defendants' alleged wrongful attachment of property of an affiliate of plaintiff, Bulk Oil (Milano) S.r.l. Defendants move to dismiss all claims. As many of the facts of this case have been reported in the Interim Award of the Arbitrator in London dated October 8, 1982 (which is annexed as Exhibit A to the

Complaint), we will not restate them here, but will develop them in our discussion of the various points of defendants' motion.

I. Antitrust Claim

Plaintiff alleges that defendants' refusal to deliver the oil violated section 1 of the Sherman Act. Specifically, plaintiff alleges that the defendants' refusal to deliver constituted a combination and conspiracy "to comply with, further, and support the Arab Boycott of Israel by refusing to deliver crude oil contracted for by plaintiff and similarly situated companies for delivery to Israel". Complaint ¶ 71. We grant defendants' motion to dismiss this claim because we find defendants' refusal to deliver was neither a "refusal to deal" nor a boycott. We further find we lack subject matter jurisdiction over this claim, and that the Act of State doctrine precludes adjudication of this claim.

The contract between Bulk (Zug) and SIL called for SIL to deliver "certain quantities of United Kingdom North Sea crude oil for the price and in accordance with the terms set forth in that contract". Complaint ¶ 35. As the Arbitrator's Interim Award indicates, the contract contained a "Destination Clause" which read:

> Destination Free but always in line with exporting country's Government policy.
>
> United Kingdom Government policy, at present, does not allow delivery to South Africa.

Interim Award at ¶ 34. As the Arbitrator further found, in 1981, U.K. Government policy "precluded the direct export of North Sea crude to Israel". *Id.* at ¶ 53. Bulk Zug's nomination of Haifa as the oil's destination thus constituted a breach of contract that relieved SIL of its obligations under the agreement. *Id.* at ¶¶ 61, 148. *See also* Final Award at ¶ 7. SIL's refusal to deliver the

oil therefore was a lawful exercise of its rights under the law of contract, not a violation of the antitrust laws.

Even if SIL's failure to deliver the oil could be construed as a boycott or refusal to deal for the purposes of the antitrust statute, we find we lack jurisdiction to hear this claim under *National Bank of Canada v. Interbank Card Association*, 666 F.2d 6 (2d Cir. 1981). In *Interbank*, the Second Circuit stated that the proper test of jurisdiction in cases alleging extraterritorial violations of the antitrust laws was "whether the challenged restraint has, or is intended to have, any anticompetitive effect upon United States commerce, either commerce within the United States or export commerce from the United States". *Id.* at 8. In stating this test, the Second Circuit specifically rejected the Ninth Circuit's test for jurisdiction in such cases as stated in *Timberlane Lumber Co. v. Bank of America N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1977).[1] *Timberlane's* test, the Second Circuit noted, could "lead unwarrantedly to an assertion of jurisdiction whenever the challenged conduct is shown to have some effect on American foreign commerce, even though the actionable aspect of the restraint, the anticompetitive effect, is felt only within the foreign market in which the injured plaintiff seeks to compete". *Id.*

In this case, plaintiff has alleged the following effects in the Complaint at paragraph 73:

> (a) the flow of crude oil in the foreign trade and commerce of the United States has been burdened by the defendants' compliance with Arab Boycott;

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[1] *Timberlane* set a "tripartite test of (1) a restraint affecting or intended to affect foreign commerce of the United States, (2) a restraint of sufficient magnitude to 'present a cognizable injury' to the plaintiff, and (3) the propriety of asserting extraterritorial jurisdiction as a matter of international comity and fairness." *Interbank*, 666 F.2d at 8.

(b) the availability of crude oil in the United States has been affected by defendants' compliance with the Arab boycott;

(c) plaintiff has been deprived of the benefits of free and open competition; and

(d) plaintiff has been injured in its business by defendants' compliance with the Arab Boycott.

Paragraph 73(b), (c) and (d) do not state effects sufficient to confer subject matter jurisdiction under *Interbank* since none of them allege anticompetitive effects on United States commerce. Read alone, paragraph 73(a) appears to be a sufficient statement of anticompetitive effects, but we find this conclusion undercut by other information contained in the complaint. As a preliminary matter, the transaction in question here was a contract between a Swiss company (¶ 4) and a Bermuda corporation (¶ 6) to deliver North Sea oil (¶ 35) to an Israeli customer (¶ 56). The suppliers of the oil were Swedish (¶¶ 20, 58) and British (¶¶ 20, 60). These facts alone suggest a most tenuous connection to United States commerce. More significantly, however, defendants' non-delivery of the oil to plaintiff in fact resulted in eight of thirteen cargoes being delivered to the United States. ¶ 54. As counsel conceded at oral argument, the net result of defendants' non-delivery was to increase the supply of crude oil in the United States, and thus the actual effect in the United States was pro-competitive. On this record, we cannot conclude that subject matter jurisdiction exists under *Intercard*'s standard.

Plaintiff does not elaborate upon any of these alleged effects in its papers in opposition to this motion. Rather, it argues that jurisdiction is proper under *Interbank* because the anticompetitive effects of a group boycott are presumed as a matter of law, citing *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5 (1958) (which cites, in turn, *Fashion Originators' Guild v.*

Federal Trade Commission, 312 U.S. 457 (1941)). *Northern Pacific* and *Fashion Originators' Guild* do state that group boycotts are *per se* violations of the antitrust laws, not subject to a rule of reason analysis. They do not say, however, that any boycott, anywhere, is presumed to have anticompetitive effects in the United States.[2]

We also find that plaintiff's claim raises substantial Act of State problems that render adjudication inappropriate. The Act of State doctrine precludes judicial inquiry into "the validity of the public acts of a recognized foreign sovereign power committed within its own territory". *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964). In this case, the contract between Bulk and Sun was specifically pegged to "U.K. policy". U.K. policy, as stated by the British Secretary of State for Energy, precluded direct sales of North Sea oil to Israel. Interim Award at ¶¶ 40-48. To hold defendants in violation of the United States antitrust laws would thus seem to require an inquiry into the validity of official British policy. This is precisely the type of inquiry the Act of State doctrine is supposed to bar.

Plaintiff argues that the Act of State doctrine should not apply here because the British ministers' statements do not constitute formal governmental acts. Plaintiff cites the following language from *Dominicus Americana Bohio v. Gulf & Western Industries*, 473 F.Supp. 680, 689 (S.D.N.Y. 1979) in support of its argument:

> In order to trigger application of the act of state doctrine, the government act concerned must be a

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[2] Neither *Northern Pacific* nor *Fashion Originators* would seem to have the occasion to produce such a holding. *Northern Pacific* was actually a tying case; its reference to group boycotts appears in a string cite of cases that held certain practices *per se* violations. *Fashion Originators* was a boycott case, but the boycott does not appear to have extended beyond United States borders.

> public one such as *legislative enactment, regulatory decree,* or executive use of the police powers.

(emphasis supplied by plaintiff). It is not entirely clear to us that U.K. policy as expressed by Secretaries of State in response to inquiries by members of Parliament does not constitute "executive use of the police powers", mentioned in *Dominicus,* but not underscored by plaintiff. At any rate, the use of the phrase "such as" in the quoted passage suggests that the listing was not intended to be exhaustive.[3]

The more relevant inquiry appears to be whether the defendants' acts were compelled by the acts of a foreign sovereign. *See Timberlane,* 549 F.2d at 606[4] (quoting *Intramerican Refining Corp. v. Texaco Maracaibo, Inc.,* 307 F.Supp. 1291, 1298 (D. Del. 1970) ("When a nation compels a trade practice that firms there have no choice but to obey, acts of business become effectively acts of the sovereign")). With respect to this point, plaintiff asserts that the U.K.'s policy did not compel defendants' refusal to deliver crude oil to plaintiff since "defendants were always free to supply plaintiff with oil from a source other than the North Sea". Memo in Opp. at 35. Inasmuch as plaintiff alleges in its complaint, however, that the contract was one for the sale of "certain quantities of United Kingdom North Sea crude oil", ¶ 35, it would appear defendants had no obligation under the contract to do so.

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[3] Indeed, the Supreme Court has defined the doctrine as applying to "public acts a recognized foreign sovereign power committed within its own territory", *Banco Nacional de Cuba,* 376 U.S. at 401, and "acts done within their own States, in the exercise of governmental authority". *Underhill v. Hernandez,* 168 U.S. 250, 252 (1897). *See Alfred Dunhill of London, Inc. v. Republic of Cuba,* 425 U.S. 682, 706 (1976).

[4] In *Interbank,* the Second Circuit expressly declined to "question [] the pertinence of" *Timberlane's* test of "international comity and fairness" as a prerequisite for the exercise of extraterritorial jurisdiction. 666 F.2d at 8. (See note 1, *supra.*)

Plaintiff also asserts that the defendants were not bound by the U.K. policy because the policy was enforced only sporadically. However, plaintiff undercuts the strength of this argument with its statement: "*So long as violations were not made blatantly public*, noncompliance was largely ignored by the United Kingdom's Department of Energy". Memo in Opp. at 34. Yet it was precisely plaintiff's nomination of Haifa that made the noncompliance attempted here public, and that disabled the defendants from performing.

For all these reasons, therefore, we grant defendants' motion to dismiss plaintiff's antitrust claim.

II. Export Administration Act Claim

Bulk also claims that Sun's refusal to deliver the oil contracted for violated the antiboycott provisions of the Export Administration Act, 50 U.S.C. App. § 2407 et seq. (Supp. III 1979). Sun argues (1) that no private right of action exists under this statute, and (2) even if one does, the statute was not violated. We agree that no private right of action exists under the Export Administration Act, and grant defendants' motion to dismiss this claim.

The Export Administration Act of 1979 ("the Act") directs the President or his delegate to issue regulations prohibiting certain actions taken with intent to comply with, further, or support a foreign boycott. 50 U.S.C. App. § 2407. Violators are subject to criminal and civil penalties and administrative sanctions pursuant to § 11 of the Act. *Id.* § 2410(a)-(c). Actions for the recovery of penalties may be brought in the name of the United States. *Id.* § 2410(f). The statute does not contain any reference to a private right of action to enforce its substantive provisions. Since the statute clearly lacks an express private right of action, the question this motion presents is whether one may be implied.

Cort v. Ash, 422 U.S. 66, 78 (1975) set out four factors to be considered in determining whether a private remedy is to be inferred under a statute not expressly providing for one:

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted," . . .—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

More recent cases have indicated that the greatest weight is to be given to the second factor, congressional intent. *E.g.*, *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 377-78 (1982). *Merrill Lynch* furthers counsels that "the initial focus must be on the state of the law at the time the legislation was enacted. More precisely, we must examine Congress' perceptions of the law that it was shaping or reshaping." At 378.

At this point, a review of the history of the Act may be helpful. The Act was first adopted in 1949. The original statute was directed at controlling the export materials in short supply and with "potential military significance". 63 Stat. 7 (1949). The Act allowed the President to promulgate regulations prohibiting the exportation of designated materials. *Id.* § 3. Violations were punishable by fine and/or imprisonment. *Id.* § 5.

In 1965, the Act was amended to add a statement that it was the policy of the United States to oppose restrictive trade practices or boycotts. P.L. 89-63, 79 Stat. 209

(1965). The President was given authority to promulgate appropriate regulations to implement this policy. The 1965 amendments added civil penalties in addition to the penal sanctions contained in the 1949 Act. The new civil penalty sections read as follows:

> (c) The head of any department or agency exercising any functions under this Act, or any officer or employee of such department or agency specifically designated by the head thereof, may impose a civil penalty not to exceed $1,000 for each violation of this Act or any regulation, order, or license issued under this Act, either in addition to or in lieu of any other liability or penalty which may be imposed.
>
> (d) The payment of any penalty imposed pursuant to subsection (c) may be made a condition, for a period not exceeding one year after the imposition of such penalty, to the granting restoration, or continuing validity of any export license, permission, or privilege granted or to be granted to the person upon whom such penalty is imposed.
>
> (e) Any amount paid in satisfaction of any penalty imposed pursuant to subsection (c) shall be covered into the Treasury as a miscellaneous receipt. The head of the department or agency concerned may, in his discretion, refund any such penalty, within two years after payment, on the ground of a material error of fact or law in the imposition. Notwithstanding section 1346(a) of title 28 of the United States Code, no action for the refund of any such penalty may be maintained in any court.
>
> (f) In the event of the failure of any person to pay a penalty imposed pursuant to subsection (c), a civil action for the recovery thereof may, in the discretion of the head of the department or agency concerned, be brought in the name of the United States. In any such action, the court shall determine de novo all issues necessary to the establishment of liability.

> Except as provided in this subsection and in subsection (d), no such liability shall be asserted, claimed, or recovered upon the United States in any way unless it has previously been reduced to judgment.
>
> (g) Nothing in subsection (c), (d), or (f) shall limit—
>
> (1) the availability of other administrative or judicial remedies with respect to violations of this Act or any regulation, order, or license issued under this Act,
>
> (2) the authority to compromise and settle administrative proceedings brought with respect to violations of this Act or any regulation, order, or license issued under this Act, or
>
> (3) the authority to compromise, remit, or mitigate seizures and forfeitures pursuant to section 1 (b) of title VI of the Act of June 15, 1917 (22 U.S.C. 401(b)).

In 1976, there was an effort to amend the Act further. A bill that passed the House contained an explicit private right of action for treble damages:

> A United States person aggrieved by action taken as a result of a violation of section 4(k)(2) of this Act may institute a civil action in an appropriate United States district court, without regard to the amount in controversy, and may recover threefold actual damages, reasonable attorney's fees, and other litigation costs reasonably incurred, and obtain other appropriate relief.

H.R. 15377, 94th Cong., 2d Sess., § 6(g) (1976). The companion Senate version of the same legislation did not contain a comparable provision, however. *See* S. 3084, 94th Cong., 2d Sess. (1976). No final version was adopted that year.

In 1977, a new bill without the treble damage provision was introduced and passed in both the House and

the Senate. P.L. 95-52, 91 Stat. 235 (1977). The 1977 amendments were specifically aimed at taking a "stronger stand" on the problem of the Arab boycott of Israel and its impact on United States business. The 1977 amendments thus added a new section requiring the President to issue rules and regulations prohibiting any United States persons from:

> taking or knowingly agreeing to take any of the following actions with intent to comply with, further or support any boycott fostered or imposed by a foreign country against a country which is friendly to the United States: (A) Refusing, or requiring any other person to refuse, to do business with or in the boycotted country, . . . or with any other person pursuant to an agreement with, . . . or a request from or on behalf of the boycotting country. . . .

The 1977 amendments further added as an administrative sanction the revocation of export licenses for violation of the anti-boycott provisions.

In 1979, the amendments of 1977 were incorporated without change into the Export Administration Act of 1979. *See* H.R. Rep. No. 200, 96th Cong., 1st Sess. 3 (1979); P.L. 96-72, 93 Stat. 521 (1979).

Two things strike us as significant in the mass of otherwise unenlightening legislative history of the Export Administration Act. First, as far as our research can determine, it appears that no one has ever attempted to bring any sort of private action under this statute since its adoption in 1949. As follows from this, of course, no court has ever judicially recognized a private right of action under the Act. Against this background, the second point that we deem significant is Congress' failure to adopt an amendment providing for a private right of action as proposed in the House in 1976.

Plaintiff argues, citing *Leist v. Simplot*, 638 F.2d 282 (2d Cir. 1980), *aff'd sub nom. Merrill Lynch, Pierce,*

Fenner & Smith v. Curran, 456 U.S. 353 (1982), that Congress' failure to adopt the private right of action provision proposed in 1976 should not be viewed as evidence of an intent to deny a private right of action since the 1976 proposal also contained a provision for treble damages. We find this case distinguishable from *Leist*, however. *Leist* considered the question of whether a private right of action existed under the Commodity Exchange Act ("CEA") as amended in 1974. In concluding that such a right did exist, Judge Friendly noted "one differentiating factor of . . . transcendent importance": that judicial decisions prior to the 1974 amendments had uniformly upheld the existence of a private right of action, and the 1974 Congress was well aware of the existing state of the law. 638 F.2d at 303. It was this factor that led Judge Friendly to reject arguments by the defendants and the dissent that Congress' failure to enact bills that had provided for a private right of action for treble damages evidenced a Congressional intent to deny a private right of action. Since a private right of action for simple damages already existed under the CEA, the failure to adopt a treble damage provision could only be construed as an intent to deny treble damages. *See* 638 F.2d at 315 n.38.

In this case, however, no comparable history of judicial implication of a right exists. Unlike *Leist*, and like *National Railroad Passenger Corp. v. National Association of Railroad Passengers*, ("*Amtrak*") 414 U.S. 453 (1974) Congress *was* "operating on a *tabula rasa*", 638 F.2d at 313, when it revised and amended the Export Administration Act. While Congress' failure to enact a private right of action for treble damages in this case is not as strong of evidence of intent to deny a private right of action as was Congress' rejection of a provision providing for suits by any "aggrieved person" in *Amtrak*, we believe this case is closer to *Amtrak* than it is to *Leist*.

Plaintiff further argues that a private right of action should be inferred on the basis of section 11(g) of the Act, 50 U.S.C. App. § 2410(g) (Supp. III 1979). This section provides:

> (g) Other authorities
> Nothing in subsection (c), (d) or (f) limits—
>
> (1) the availability of other administrative or judicial remedies with respect to violations of this Act [sections 2401 to 2420 of this Appendix], or any regulation, order, or license issued under this Act [sections 2401 to 2420 of this Appendix] :
>
> (2) the authority to compromise and settle administrative proceedings brought with respect to violations of this Act [sections 2401 to 2420 of this Appendix] ; or
>
> (3) the authority to compromise, remit or mitigate seizures and forfeitures pursuant to section 1(b) of title VI of the Act of June 15, 1917 (22 U.S.C. 401(b)) [section 401(b) of Title 22].

"Subsection (c), (d) or (f)" as appears in subsection (g) refers to the civil penalty sections added in 1965 (and quoted at page 8, *supra*). Plaintiff argues that the phrase "or judicial remedies" should be construed as providing for a private right of action under the Act. While we believe such a reading of this section is literally possible, we find this interpretation inconsistent with the history and structure of the Act.

The legislative history of the 1965 amendments does not contain the slightest suggestion that a private right of action was intended by adoption of section (g). The discussions of the proposed provisions rather indicate an intention to increase regulatory flexibility. We thus believe the more reasonable reading of subsection (g) is that it confirms that the presence of civil penalties in sub-

sections (c), (d), or (f) in no way limited the *government's* choice of sanctions or actions to enforce the Act.

In hearings on the 1965 amendments, John Connor, Secretary of Commerce, testified before the Committee on Banking and Currency that the "amendment will add some much-needed flexibility to the enforcement of the act, by enabling us to impose an appropriate monetary sanction in certain types of cases for which existing sanctions are not well suited". Continuation of Authority for Regulation of Exports: Hearings Before the Committee on Banking and Currency; 89th Cong., 1st Sess. 5-6 (1965). Later in those same hearings, Secretary Connor further expounded upon the civil penalty amendments:

> Mr. Cabell. For the record, Mr. Secretary, on page 4 of your testimony you refer to repeated minor violations not warranting cancellation of the license.
>
> Now, are we jockeying ourselves into a position by just imposing a fine to where it would be profitable for the violator just to pay those fines if he is not threatened with cancellation of his license? I have seen that happen in other matters where it is profitable just to go ahead and pay the fine.
>
> Secretary Connor. Mr. Cabell, our intent would be to handle a few repeated minor violations after the warning letter with some kind of a civil fine after the procedure that was discussed, but if the offenses continue, then there is no reason at all why we can't proceed to the more serious type of penalties, and this would be our intent. This proposal, in other words, would just give us a broader range of arms in the arsenal.
>
> Mr. Cabell. It is not just a wrist-slapping thing. You will retain that action.
>
> Secretary Connor. Yes, sir.

Id. at 26-27. *See also* H.R. Rep. No. 434, 89th Cong., 1st Sess. 4-5 (1965).

In addition, the legislative history of the 1965 amendments indicates a keen desire on the part of Congress to spell out precisely those powers granted by the amendments, and a reluctance to leave important matters to "implication". Thus, the Senate report on H.R. 7105 contains the following statement:

> Section 2 of the bill amends section 5 of the act to authorize the administrative imposition of a civil penalty not exceeding $1,000 for any violation of the act or any regulation, order, or license issued under it. The bill differs from the bill originally proposed by the Department of Commerce in two major respects. First, the Commerce Department bill would have left to legal implication the power to collect a fine by means of the administrative sanction of withholding or suspending export licenses or privileges until the fine is paid. Under existing law, licenses may be revoked for any infraction, and the imposition of a fine would normally be a milder sanction. *However, the legal power to confront an offender with the alternative of either paying the monetary penalty or losing his license is too important a feature of the statutory scheme to be left to implication.* It is also desirable to limit to a maximum of 1 year the period for which export privileges may be withheld as a means of collecting a penalty. The monetary penalties authorized by this bill are not intended to deal with serious and flagrant violations.
>
> The other major change from the original proposal in the civil penalty provisions is to clarify the rights of persons who wish to contest in court the imposition of any such penalty. In the case of a person who does not pay the penalty, either voluntarily or to prevent the suspension of his export privileges, the bill provides that the Government may collect only by a civil action in which the court is to determine de novo all issues necessary to the establishment of liability. *It is possible that the courts might*

> *have reached this result under the language of the originally proposed bill providing that the "amount of any penalty * * * shall be recoverable in a civil suit in the name of the United States," but this is by no means certain.*

Senate Rep. No. 363, 89th Cong., 1st Sess. (1965), *reprinted in* 1965 U.S. Code Cong. & Adm. News 1826, 1831 (emphasis added). Certainly one would think that a private right of action is at least as important to the statutory scheme as "the legal power to confront an offender with the alternatives of either paying the monetary penalty or losing his license", and, if intended, would have similarly "not be[en] left to implication".

The Export Administration Act sets forth a detailed regulatory scheme for enforcement of its provisions. "A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage to subsume other remedies". *Amtrak*, 414 U.S. at 458. We believe this principle is applicable here. Finding no legislative intention to provide a private right of action under the Export Administration Act, we grant defendants' motion to dismiss this claim.

III. The RICO Claim

Plaintiff's fourth claim alleges a violation by defendants SOTC and SIL[5] of the Racketeering Influenced and Corrupt Organization Act ("RICO"), 18 U.S.C. § 1961 et seq. (1976). Defendants move to dismiss the claim on the grounds that plaintiff has failed to allege a connection on their part to "organized crime", and has failed to allege an injury from "racketeering activity".

---

[5] The complaint uses the general term "defendants" in discussing the RICO violation (*see, e.g.*, ¶ 87), however, no mention of defendant SII appears in allegations made with respect to that claim.

RICO makes it unlawful for any person to engage in certain "racketeering activities" or to conspire to do so. 18 U.S.C. § 1964 provides for civil remedies. Section 1964(c) provides:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover the threefold damages he sustains and the cost of the suit, including a reasonable attorney's fee.

Congress' self-declared purpose in enacting RICO was "to seek the eradication of organized crime in the United States". *United States v. Turkette*, 452 U.S. 576, 589 (1981) (quoting 84 Stat. 923). On the basis of the statute's legislative history, several judges in this district have concluded that a complaint under the civil provisions of RICO must allege a link between the defendants and organized crime. *See, e.g., Minpeco, S.A. v. Conticommodity Services, Inc.*, 558 F. Supp. 1348, 1351 (S.D.N.Y. 1983) (Lasker, J.); *Noonan v. Granville-Smith*, 537 F. Supp. 23, 29 (S.D.N.Y. 1981) (Knapp, J.); *Barr v. WUI/TAS, Inc.*, 66 F.R.D. 109, 113 (S.D.N.Y. 1975) (MacMahon, J.). *Contra, Hellenic Lines v. O'Hearn*, 523 F. [Supp.] 244, 247 (S.D.N.Y. 1981) (Duffy, J.). Although we have no doubt that Congress did not intend "to create a private right of action for treble damages for violations of substantive statutes by ordinary business or parties", *Moss v. Morgan Stanley, Inc.*, 553 F. Supp. 1347, 1361 (S.D.N.Y. 1983), we are reluctant to read an "organized crime" requirement into the civil statute given the constitutional problems that would be raised by such a requirement in the criminal context. *See Bankers Trust Co. v. Feldesman*, No. 82 Civ. 5590 (WCC), slip op. at 6 (S.D.N.Y. June 29, 1983) (available on Lexis, Genfed library, Dist file) (citing 116 Cong. Rec. 35204 (1970) (remarks of Congressman Poff). We also note the problems inherent in the task of defining "organized

crime". *Cf. Minpeco, S.A.* 559 F. Supp. at 1351. ("It is unnecessary to attempt at this point to specify a definition of organized crime. Minpeco has not alleged any link between the defendants and organized crime, by any definition.")

We do agree with defendants, however, that to state a claim for damages under civil RICO, a plaintiff must do more than simply allege performance of at least two predicate acts listed at 18 U.S.C. 1961(1) within a ten year period. Section 1964(c) grants standing to any person injured "by reason of a violation of section 1962 of this chapter". "Unless these words have no effect, they can only mean that the plaintiff's injuries must derive from the 'pattern of racketeering activity' which violates section 1962 rather than directly from the underlying acts which combine to constitute that pattern." *Bankers Trust Co.*, slip op. at 7. *See also Richardson v. Shearson/American Express Co.*, Fed. Sec. L. Rep. (CCH) ¶ 99,145 at 95,525-26 (S.D.N.Y. April 13, 1983); *Moss v. Morgan Stanley, Inc.*, 553 F. Supp. 1347, 1361 (S.D.N.Y. 1983). We thus consider whether plaintiff has alleged an injury "by reason of a violation of section 1962".

Section 1962 provides in relevant part:

> Prohibited activities
>
> (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest to, or the establishment or operation of, any enterprise which is engaged in or the activi-

> ties of which affect, interstate or foreign commerce. . . .
>
> (b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.
>
> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

Plaintiff has not alleged any injury by virtue of section 1962(a). That is, plaintiff has not claimed that it was injured by defendants' investment of any income derived from their alleged "pattern of racketeering activity".[6] Nor has plaintiff alleged injury through a violation of section 1962(b)—the acquisition of an interest in any enterprise through a pattern of racketeering activity. The determination of whether plaintiff has alleged injury by virtue of section 1962(c), however, requires a more detailed analysis of that section's terms.

---

[6] A "pattern of racketeering activity" under the statute is "at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years . . . after the commission of a prior act of racketeering activity". 18 U.S.C. § 1961(5). A "racketeering activity" is one of the many predicate acts (which include extortion as alleged in this complaint) set forth at 18 U.S.C. § 1961(1).

Section 1962(c), by its terms, applies to "persons" who are "employed by or associated with any enterprise" and who participate in the conduct of that enterprise's affairs "through a pattern of racketeering activity". "Persons" under RICO include individuals and entities capable of holding interests in property. 18 U.S.C. § 1961(3). An "enterprise" under the statute includes:

> any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.

As can be seen, section 1962(c) "clearly envisions a relationship between a 'person' and an 'enterprise' as an element of the offense which [it] proscribes and for which 1964(c) would subject the 'person' to treble damages". *Van Schaik v. Church of Scientology of California, Inc.*, 535 F. Supp. 1125, 1136 (D. Mass. 1982). *See also Bennet v. Berg*, 685 F.2d 1053, 1061 (8th Cir. 1982); *Eaby v. Richmond*, 561 F. Supp. 131, 134 (E.D. Pa. 1983); *Parnes v. Heinold Commodities, Inc.*, 549 F. Supp. 20, 23-24 (N.D. Ill. 1982). *But cf. United States v. Hartley*, 678 F.2d 961, 988 (11th Cir. 1982), *cert. denied*, 103 S. Ct. 815 (1983) (corporation may be both criminal defendant and enterprise); *D'lorio v. Adonizio*, 554 F. Supp. 222, 232-33 (M.D. Pa. 1982) (enterprise may be named a civil defendant when alleged to have been operated by directors and controlling partners through a pattern of racketeering activity).

In this case, plaintiff has not made clear in its complaint who is the person sought to be held liable for participating in the conduct of what enterprise. Indeed, it appears that plaintiff considers "person", "enterprise", and "pattern of racketeering activity" all to be synonymous for the purposes of the statute. We do not believe such a loose reading of the statute is warranted, particularly when the potential for abuse of the statute in

light of its purpose is considered. More significantly, however, we find that as pleaded, the complaint does not state a claim of injury from violation of section 1962(c) no matter who is considered the person or the enterprise. If, for example, one considers SOTC and SIL collectively "the enterprise", then plaintiff has named no person employed by or associated with that enterprise whose conduct caused them injury. Alternatively, if one considers SOTC as the enterprise and SIL the person "associated with" SOTC, then plaintiff has not pleaded a "*pattern* of racketeering activity" on SIL's part since SIL is alleged to have participated in only one predicate act, namely, the wrongful attachment of Bulk (Milano)'s property. Finally, if SIL is the enterprise and SOTC the person, plaintiff has not alleged SOTC's "participation . . . in the conduct of such enterprise's affairs *through* a pattern of racketeering activity" since, again, SOTC apparently acted alone in ordering oil from Bulk (USA) without the intention of paying. As was explained in *United States v. Scotto*, 641 F.2d 47, 54 (2d Cir. 1980), *cert. denied*, 452 U.S. 961 (1981):

> one conducts the activities of an enterprise through a pattern of racketeering when (1) one is enabled to commit the predicate offenses solely by virtue of his position in the enterprise, or (2) the predicate offenses are related to the activity of that enterprise. Simply committing predicate offenses which are unrelated to the enterprise or one's position within it would be insufficient.

Finally, plaintiff has not stated a claim of injury under section 1962(d) since it does not allege any conspiracy to violate sections (a), (b) or (c).

IV. The Wrongful Attachment Claim

As we have indicated to the parties in our letter of August 8, 1983, we are unable to decide defendants' motion to dismiss this claim without briefing on the issues

of which jurisdiction's law applies, and whether plaintiff's claim is legally sufficient under that law. Accordingly, we defer decision on this point pending receipt of further briefs on these issues.

V. Summary

Plaintiff's claims under the Sherman Act, the Export Administration Act and RICO are dismissed. Decision on plaintiff's wrongful attachment claim is deferred as indicated in section IV above.

SO ORDERED.

/s/ Charles E. Stewart
United States District Judge

Dated: New York, New York
August 11, 1983

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 3rd day of April one thousand nine hundred and eighty-four.

Nos. 83-7785, 83-7781

BULK OIL (ZUG) A.G.,
Plaintiff-Appellant,

v.

SUN COMPANY, INC., *et al.*,
Defendants-Appellees.

BULK OIL (MILANO) S.R.L.,
Plaintiff-Appellant,

v.

SUN INTERNATIONAL LIMITED, and
SUN OIL TRADING COMPANY,
Defendants-Appellees.

[Filed Apr. 3, 1984]

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiff-appellant, Bulk Oil (ZUG) A.G.,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith
ELAINE B. GOLDSMITH
Clerk

APPENDIX B

STATUTES AND REGULATIONS INVOLVED

I. Section 1 of the Sherman Act, 15 U.S.C. § 1 (1976), provides in pertinent part:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. * * *

* * * *

II. The Export Administration Act of 1979, 50 U.S.C. App. §§ 2401-2420 (Supp. V 1981), provides in pertinent part:

§ 2407. *Foreign boycotts*

(a) Prohibitions and exceptions

(1) For the purpose of implementing the policies set forth in subparagraph (A) or (B) of paragraph (5) of section 3 of this Act [section 2402(5)(A) or (B) of this Appendix], the President shall issue regulations prohibiting any United States person, with respect to his activities in the interstate or foreign commerce of the United States, from taking or knowingly agreeing to take any of the following actions with intent to comply with, further, or support any boycott fostered or imposed by a foreign country against a country which is friendly to the United States and which is not itself the object of any form of boycott pursuant to United States law or regulation:

> (A) Refusing, or requiring any other person to refuse, to do business with or in the boycotted country, with any business concern organized under the laws of the boycotted country, with any national or resident of the boycotted country, or with any other person, pursuant to an agreement with, a requirement

of, or a request from or on behalf of the boycotting country. The mere absence of a business relationship with or in the boycotted country, with any business concern organized under the laws of the boycotted country, with any national or resident of the boycotted country, or with any other person, does not indicate the existence of the intent required to establish a violation of regulations issued to carry out this subparagraph.

* * * *

§ 2410. *Violations*

* * * *

(c) Civil penalties; administrative sanction

(1) The head of any department or agency exercising any functions under this Act [sections 2401 to 2420 of this Appendix], or any officer or employee of such department or agency specifically designated by the head thereof, may impose a civil penalty not to exceed $10,000 for each violation of this Act [section 2401 to 2420 of this Appendix] or any regulation, order, or license issued under this Act [sections 2401 to 2420 of this Appendix], either in addition to or in lieu of any other liability or penalty which may be imposed, except that the civil penalty for each such violation involving national security controls imposed under section 5 of this Act [section 2404 of this Appendix] or controls imposed on the export of defense articles and defense services under section 38 of the Arms Export Control Act [section 2778 of Title 22] may not exceed $100,000.

(2) (A) The authority under this Act [sections 2401 to 2420 of this Appendix] to suspend or revoke the authority of any United States person to export goods or technology may be used with respect to any violation of the regulations issued pursuant to section 8(a) of this Act [section 2407(a) of this Appendix].

(B) Any administrative sanction (including any civil penalty or any suspension or revocation of authority to export) imposed under this Act [sections 2401 to 2420 of this Appendix] for a violation of the regulations issued pursuant to section 8(a) of this Act [section 2407 (a) of this Appendix] may be imposed only after notice and opportunity for an agency hearing on the record in accordance with sections 554 through 557 of title 5, United States Code.

(C) Any charging letter or other document initiating administrative proceedings for the imposition of sanctions for violations of the regulations issued pursuant to section 8(a) of this Act [section 2407(a) of this Appendix] shall be made available for public inspection and copying.

(d) Payment of penalties

The payment of any penalty imposed pursuant to subsection (c) may be made a condition, for a period not exceeding one year after the imposition of such penalty, to the granting, restoration, or continuing validity of any export license, permission, or privilege granted or to be granted to the person upon whom such penalty is imposed. In addition, the payment of any penalty imposed under subsection (c) may be deferred or suspended in whole or in part for a period of time no longer than any probation period (which may exceed one year) that may be imposed upon such person. Such a deferral or suspension shall not operate as a bar to the collection of the penalty in the event that the conditions of the suspension, deferral, or probation are not fulfilled.

(e) Refunds

Any amount paid in satisfaction of any penalty imposed pursuant to subsection (c) shall be covered into the Treasury as a miscellaneous receipt. The head of the department or agency concerned may, in his discre-

tion, refund any such penalty, within 2 years after payment, on the ground of a material error of fact or law in the imposition of the penalty. Notwithstanding section 1346(a) of title 28, United States Code [section 1346(a) of title 28], no action for the refund of any such penalty may be maintained in any court.

(f) Actions for recovery of penalties

In the event of the failure of any person to pay a penalty imposed pursuant to subsection (c), a civil action for the recovery thereof may, in the discretion of the head of the department or agency concerned, be brought in the name of the United States. In any such action, the court shall determine de novo all issues necessary to the establishment of liability. Except as provided in this subsection and in subsection (d), no such liability shall be asserted, claimed, or recovered upon by the United States in any way unless it has previously been reduced to judgment.

(g) Other authorities

Nothing in subsection (c), (d), or (f) limits—

(1) the availability of other administrative or judicial remedies with respect to violations of this Act [sections 2401 to 2420 of this Appendix], or any regulation, order, or license issued under this Act [sections 2401 to 2420 of this Appendix];

(2) the authority to compromise and settle administrative proceedings brought with respect to violations of this Act [section 2401 to 2420 of this Appendix], or any regulation, order, or license issued under this Act [sections 2401 to 2420 of this Appendix]; or

(3) the authority to compromise, remit or mitigate seizures and forfeitures pursuant to section 1(b) of title VI of the Act of June 15, 1917 (22 U.S.C. 401(b)) [section 401(b) of Title 22].

III. 15 C.F.R. § 369.2 (1984), provides in pertinent part:

§ 369.2 *Prohibitions.*

(a) Refusals to do business.

PROHIBITION AGAINST REFUSALS TO DO BUSINESS

(1) No United States person may:	to do business	when such refusal is pursuant to
refuse, knowingly agree to refuse, require any other person to refuse, *or* knowingly agree to require any other person to refuse,	with or in a boycotted country, with any business concern organized under the laws of a boycotted country, with any national or resident of a boycotted country, *or* with any other person,	an agreement with the boycotting country, a requirement of the boycotting country, *or* a request from or on behalf of the boycotting country.

(2) Generally, a refusal to do business under this section consists of action that excludes a person or country from a transaction for boycott reasons. This includes a situation in which a United States person chooses or selects one person over another on a boycott basis or takes action to carry out another person's boycott-based selection when he knows or has reason to know that the other person's selection is boycott-based.

(3) Refusals to do business which are prohibited by this section include not only specific refusals, but also refusals implied by a course or pattern of conduct. There need not be a specific offer and refusal to constitute a refusal to do business; a refusal may occur when a United States person has a financial or commercial opportunity and declines for boycott reasons to consider or accept it.

* * * *

(8) An agreement is not a prerequisite to a violation of this section since the prohibition extends to actions taken pursuant not only to agreements but also to re-

quirements of, and requests from or on behalf of, a boycotting country.

(9) Agreements under this section may be either express or implied by a course or pattern of conduct. There need not be a direct request from a boycotting country for action by a United States person to have been taken pursuant to an agreement with or requirement of a boycotting country.

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